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THE ROAD NOT TAKEN: PERSPECTIVES ON NO-FAULT COMPENSATION FOR TOBACCO AND OPIOID VICTIMS

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Cigarettes and prescription painkillers have killed millions of Americans and diminished the lives of tens of millions more. This wreckage has generated waves of prolonged litigation—and, in fact, the evolution of this litigation has been strikingly similar. In both tobacco and in opioids, lawsuits were initially filed by individual victims of defendants' tortious conduct. But in both instances, one-off suits saw virtually no success, foundering on vast resource disparities and a widespread perception that plaintiffs (smokers on the one hand, "addicts" on the other) were partly or mostly to blame. In time, plaintiffs adapted. States and cities took the reins, and these public actors initiated their own suits. This handoff (from private plaintiffs to public ones) succeeded in many respects. But it relegated individual victims to the sidelines and—crucially—consigned their quest for compensation to the back burner.

In this Essay, we zero in on this compensation question. We explore the fact compensatory claims got pushed aside and note that these claims have generally remained on the periphery. We further observe that, after the tort system left individual victims conspicuously empty-handed, support might have coalesced around the creation of a no-fault compensation scheme for tobacco or opioid-related harms. Yet, discussion of such a scheme has been quiet—and concrete action toward the creation of such a system has been notably non-existent. Why? We chalk this omission up to three stubborn realities. First, the will and capacity to strike a political compromise of this magnitude is lacking. Second, existing no-fault schemes have mixed scorecards, at best. And third, both tobacco and opioid victims pose particular challenges, as a perception that these individuals have contributed to their own harm has undermined any prospect of compensation through a

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no-fault scheme, just as surely as it dimmed plaintiffs' prospects for recovery through tort.

I. PRELUDE

Among the most prominent man-made public health disasters in recent times have been those associated with tobacco and opioids use.[3] Given the devastation they have wrought and the controversy they have engendered, both products appear, at first blush, to be strong candidates for affording relief to victims through the tort system. After all, both products—cigarettes and prescription painkillers—are highly addictive and were, in their respective heydays, sold in extraordinarily high quantities.[4] Both were marketed by well-resourced manufacturers who exaggerated the products' benefits and downplayed their risks.[5] Both have imposed an economic toll that runs in the trillions of dollars.[6] Both sets of manufacturers profited handsomely from

3. Both products have imposed a human toll that is truly staggering: for opioids, 48,000 deaths per year—for tobacco, ten times that many. Based on the most recently published CDC figures, cigarette smoking in the United States accounts for more than 480,000 premature deaths per year. *Tobacco-Related Mortality*, CDC, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality/index.htm (last visited Oct. 17, 2020). Meanwhile, opioids claim some 48,000 Americans annually, dwarfing the carnage caused by both car crashes and gun violence, and recent evidence suggests that opioid deaths may be increasing, in the shadow of COVID-19. *See* Lawrence Scholl et al., *Drug and Opioid-Involved Overdose Deaths—United States, 2013–2017*, 67 CDC MORBIDITY & MORTALITY WKLY. REP. 1419, 1419 (2019); Zoe Rohrich, *Opioid deaths are surging in the pandemic. Here's how treatment is adapting*, PBS NEWS HOUR (Aug. 7, 2020, 4:13 PM) https://www.pbs.org/newshour/health/opioid-deaths-are-surging-in-the-pandemic-heres-how-treatment-is-adapting. For the comparison to car crashes and gun violence, see Nora Freeman Engstrom & Michelle M. Mello, *Litigation is Critical to Opioid Crisis Response*, DAILY J. (Mar. 13, 2019).

4. Cigarette consumption in the United States topped out in the late 1950s, by which time nearly half of Americans (sixty-eight percent of men and thirty-two percent of women) had acquired the habit, and American per capita cigarette consumption approached nearly four thousand cigarettes per person per year, roughly half a pack per day for every adult American. Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation*, 73 STAN. L. REV. 285, 292 (2021). In recent years, smoking rates have dropped sharply, but still, approximately fourteen percent of adults—one in seven—smoke cigarettes. *Id.* at 289. Prescription opioids, meanwhile, reached their peak in 2010, when an astounding 81.2 opioid prescriptions were filled per 100 persons per year. *Id.* at 325.

5. One difference, of course, is that, in the tobacco context, the ads were aimed at smokers; in the opioid context, the advertisements were aimed chiefly at physicians. For the extraordinarily aggressive marketing of cigarettes, see Frank J. Chaloupka et al., *Policy Levers for the Control of Tobacco Consumption*, 90 KY. L.J. 1009, 1033 (2001). For opioid marketing, see GENERAL ACCOUNTING OFFICE, GAO-04-110, PRESCRIPTION DRUGS: OXYCONTIN ABUSE AND DIVERSION AND EFFORTS TO ADDRESS THE PROBLEM 17 (2003).

6. A 2017 report from the Council of Economic Advisers estimates the economic cost of the opioid crisis exceeds $500 billion annually, which works out to nearly three percent of the gross domestic product of the United States. COUNCIL ECON. ADVISERS, THE UNDERESTIMATED COST OF THE OPIOID CRISIS 1 (2017). Economic costs associated with tobacco-related disease in 2017 were estimated to be more than $300 billion, including nearly $170 billion in direct medical

the products' sales.[7] And, neither has been confined in terms of geography, race, gender, and social class, albeit, for both, the poor and less-educated segments of the population have been hardest hit.[8]

As might be expected, both products set off waves of individual tort litigation. For cigarettes, starting in 1954, and then for opioids starting in 2001, direct victims (or, in some cases, victims' decedents) filed hundreds of *individual* product liability claims against tobacco and opioid manufacturers, respectively, relying on conventional tort theories. But, in both—somewhat stunningly—these one-off suits saw virtually no success.[9] Looming large as obstacles in both scenarios were resource disparities (as plaintiffs struggled when going up against exceedingly well-financed foes), alongside a deeply-rooted perception that the "victims" were not innocent of the risks associated with their conduct.[10]

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costs and another $156 billion in lost productivity. *See* Engstrom & Rabin, *supra* note 4, at 289. If, as above, the value of lives lost is factored in, the economic toll of tobacco use rises dramatically—to more than $4.5 trillion per year. *Id.*

7. Though, to be accurate, even in OxyContin's heyday, profits from cigarette sales swamped opioid earnings. Experts estimate that, between 1996 and 2019, OxyContin generated $35 billion in revenue for Purdue and $4 billion for the Sacklers. Benjamin Soskis, *Why haven't major institutions cut ties with the Sackler family?*, WASH. POST (Mar. 15, 2019), https://www.washingtonpost.com/outlook/why-havent-major-institutions-cut-ties-with-the-sackler-family/2019/03/15/6b06d2ec-4102-11e9-a0d3-1210e58a94cf_story.html. For the extraordinary profitability of tobacco companies, even today, see Jennifer Maloney & Saabira Chaudhuri, *Against All Odds, the U.S. Tobacco Industry Is Rolling in Money*, WALL ST. J. (Apr. 23, 2017, 1:31 PM), https://www.wsj.com/articles/u-s-tobacco-industry-rebounds-from-its-near-death-experience-1492968698.

8. For smoker demographics, see *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General*, U.S. DEP'T OF HEALTH & HUMAN SERVS. 7 (2014) [hereinafter HHS RETROSPECTIVE], which reports: "[V]ery large disparities in tobacco use remain across groups defined by race, ethnicity, educational level, and socioeconomic status and across regions of the country." Likewise, "[l]ower-income individuals, including those on Medicaid and the uninsured, are more likely to misuse opioids and have opioid use disorder than the general U.S. population." Robin Ghertner & Lincoln Groves, *The Opioid Crisis and Economic Opportunity: Geographic and Economic Trends*, ASPE RES. BR., Sept. 11, 2018, at 1.

9. In tobacco, this first wave encompassed somewhere between 275 and 813 claims; none succeeded. Engstrom & Rabin, *supra* note 4, at 295 n.38. In opioids, this first wave encompassed more than 1,400 claims filed on behalf of at least 5,000 victims. Again, with one key exception, plaintiffs saw very little success. *Id.*

10. For more on the public's negative perception of smokers and users of opioids, see *infra* Part II. For how this perception clouded early tobacco litigation, see Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, *in* SMOKING POLICY: LAW, POLITICS, AND CULTURE 126–27 (Robert L. Rabin & Stephen D. Sugarman eds., 1993). In the opioid litigation, the wrongful conduct rule fortified this perception. A common law invention, the wrongful conduct rule posits that "a plaintiff cannot maintain a tort action for injuries that are sustained as the direct result of his or her knowing and intentional participation in a criminal act." Greenwald v. Van Handel, 88 A.3d 467, 472 (Conn. 2014) (citing Oden v. Pepsi Cola Bottling Co. of Decatur, Inc., 621 So. 2d 953, 954–55 (Ala. 1993)). While successfully fending off individually-initiated product liability suits concerning OxyContin, Purdue used the wrongful

Then, in both tobacco and opioids, the litigation underwent a profound metamorphosis. It came to be aggregated, rather than individualized—and deterrence, not individualized compensation, took center stage.

In the case of tobacco, this aggregated litigation moved forward on two fronts: a privately initiated nationwide class action, representing tens of millions of claimants, alongside a government-initiated suit, seeking equitable relief.

The first front, initiated on March 29, 1994, featured *Castano v. American Tobacco*, a putative class action filed on behalf of some ninety million claimants and dubbed "Mother of All Lawsuits."[11] Rather than focusing on the staple of conventional personal injury claims (*e.g.*, compensation for medical bills, lost wages, and pain and suffering), *Castano* sought to recoup the costs associated with addiction—smoking cessation treatment, medical monitoring, and research into methods of treatment and cure.[12] However, after successfully obtaining class certification from the federal district court in the Eastern District of Louisiana, the Fifth Circuit Court of Appeals reversed, decertifying the class as failing to meet the predominance and superiority requirements of Federal Rule of Civil Procedure 23(b)(3).[13]

The second front—spearheaded by state attorneys general (AGs) rather than private attorneys (though highly-skilled private attorneys functioned as co-counsel)—was filed almost simultaneously with *Castano* but was far more successful. Initially launched in the state of Mississippi, these public claims were focused not on compensation per se,

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conduct rule to its great advantage. *E.g.*, Price v. Purdue Pharma Co., 920 So. 2d 479, 485–86 (Miss. 2006) (holding that "'the wrongful conduct rule' in Mississippi prevents a plaintiff from suing caregivers, pharmacies, and pharmaceutical companies and laboratories for addiction to a controlled substance which he obtained through his own fraud, deception, and subterfuge"); Foister v. Purdue Pharma, L.P., 295 F. Supp. 2d 693, 705 (E.D. Ky. 2003) (relying on the principle to hold that "the seven plaintiffs that procured and used OxyContin illegally may not recover in this action"); *accord* Tug Valley Pharmacy, LLC v. All Plaintiffs Below In Mingo Cty., 773 S.E.2d 627, 639 (W. Va. 2015) (Loughry, J., dissenting) (explaining that "Florida, Iowa, Michigan, Mississippi, and a Kentucky federal court have applied the [wrongful conduct] rule to bar recovery in claims for drug addiction, as in the case at bar").

11. For more on *Castano*, see Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 333–34 (2001); Elizabeth J. Cabraser, *The Road Not Taken: Thoughts on the Fifth Circuit's Decertification of the Castano Class*, 24 ALI-ABA 433, 437 (1996). For the ninety million figure, see Engstrom & Rabin, *supra* note 4, at 300.

12. *See* Engstrom & Rabin, *supra* note 4, at 300.

13. Castano v. Am. Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734, 746–49 (5th Cir. 1996). Pursuant to Rule 23(b)(3), a court may certify a class only if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED R. CIV. P. 23(b)(3).

but on reimbursement.[14] Seeking relief on equitable grounds, the premise of these claims was that the industry's deceptive and misleading conduct constituted a wrong *against the public* as well as against those who actually smoked.[15] By framing the suit this way, Mississippi—and then the many states that ultimately followed in Mississippi's footsteps—thus sought to recover the billions in state funds that they had spent treating sick smokers.

After three years of hard-fought litigation, the states and the major tobacco companies resolved their claims through a settlement—the Master Settlement Agreement (MSA) of 1998.[16] The MSA, which remains the largest settlement in U.S. history, remitted to states the staggering sum of $206 billion to be paid out over twenty years (on top of $40 billion recovered in an earlier settlement of the Mississippi claim and three other claims) and also included numerous other provisions designed to curb the sale of cigarettes.[17] These included advertising restrictions, limits on lobbying activity, the allocation of funds for an aggressive anti-smoking campaign (initially, the American Legacy Foundation, now the Truth Initiative), and expanded public access to previously confidential tobacco company documents.[18]

In similar fashion, states and cities have come to take center stage in the opioid litigation. These efforts started as far back as 2001, when West Virginia's Attorney General initiated a *parens patriae* action based on Purdue Pharma's promotion and distribution of OxyContin to state residents.[19] More recently, a continuing surge of state-initiated claims has been complemented by a widely publicized federal multidistrict (MDL) proceeding before Judge Dan Polster in Ohio. Massive in scope, the MDL consolidates the claims of some 2,700 cities, municipalities, counties, Native American tribes, and hospitals against a

14. *See* Engstrom & Rabin, *supra* note 4, at 302–03.

15. Rabin, *supra* note 10, at 337; Michael Janofsky, *Mississippi Seeks Damages From Tobacco Companies*, N.Y. Times (May 24, 1994), https://www.nytimes.com/1994/05/24/us/mississippi-seeks-damages-from-tobacco-companies.html.

16. 46 States and Territories Approve Settlement with Tobacco Companies: The States' Settlement, Andrews Tobacco Indus. Litig. Rep. 3 (1999).

17. Engstrom & Rabin, *supra* note 4, at 305.

18. *Id.* at 344. For more on the Truth Initiative and the MSA's document disclosure provisions, see *Our History*, Truth Initiative, https://truthinitiative.org/who-we-are/our-history (last accessed Oct. 17, 2020). For a detailed overview, see generally W. Kip Viscusi, Smoke-Filled Rooms: A Postmortem on the Tobacco Deal (2002).

19. Engstrom & Rabin, *supra* note 4, at 314. West Virginia and Purdue settled the claims for $10 million. *Id.* Following West Virginia's lead, twenty-six other states and the District of Columbia sued as well; in 2007, these suits were settled for $19.5 million. *Id.* at 314–15. This wave of litigation with public entities culminated with Purdue's settlement with Kentucky for $24 million in 2015. *Id.* at 316. During this time, Purdue and its executives also faced—and pled guilty to—criminal charges, paying hundreds of millions in penalties. *Id.* at 315.

range of manufacturers, distributors, and retailers and seeks billions of dollars in economic and injunctive relief.[20]

As the smoke clears on these aggregation efforts, one feature stands out with special prominence. From a compensation perspective, individual victims—who initiated both litigation episodes and have, at least arguably, borne the brunt of defendants' misconduct—have been lost in the shuffle.

To be sure, when claims filed by public entities succeed, the deterrence aim of tort fares reasonably well; the tobacco and opioid suits initiated by the municipalities and state AGs have, at least partly, caused defendants to internalize the costs of their products. Over the course of public entity suits, tort has also—quite admirably—performed its information-forcing role.[21] But critically, tort's complementary aim of delivering fair compensation for victims has gone missing.

II. No-Fault Under the Looking Glass

It seems apposite, then, to take a close look at a well-recognized, complementary remedial scheme that might have filled the gap generated by the exclusivity of public entity redress: no-fault compensation for tobacco and opioids victims. Strikingly, a turn in this direction—the congressional creation of a no-fault scheme to compensate those harmed by cigarettes or prescription painkillers—has not emerged as a realistic possibility.

That, unto itself, is worth highlighting. For decades, replacement regimes—regimes that jettison tort law, with its individualized consideration of fault and idiosyncratic assessment of damages, in favor of a government-administered no-fault alternative—have been the go-to weapon in serious tort reformers' collective arsenals.[22] Over the past century, such schemes have been advocated for dozens of times, proposed for everything from airline, railway, and autonomous vehicle accidents; unintended pregnancies; data breaches; those who contract

20. *Id.* For the 2,700 figure, see *In re* Nat'l Prescription Opiate Litig., 956 F.3d 838, 841 (6th Cir. 2020).

21. For discussion and contemporary examples of litigation's "information-forcing" role, see Alexandra Lahav, In Praise of Litigation 56, 58–59, 67, 69, 83 (2017); Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 Wake Forest L. Rev. 293, 333–35 (2018). For how litigation, in both the tobacco and opioid contexts, fulfilled this function see Engstrom & Rabin, *supra* note 4, at 356; Alexandra D. Lahav & Elizabeth Chamblee Burch, *Information for the Common Good in Mass Torts*, 70 DePaul L. Rev. 2 (2021).

22. Nora Freeman Engstrom, *A Dose of Reality for Specialized Courts: Lessons from the VICP*, 163 U. Pa. L. Rev. 1631, 1641, 1649 (2015) (collecting examples). For more on "replacement" regimes, see Thomas F. Burke, Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society 38–41 (2002).

HIV after a blood transfusion; to those injured in schoolyard play, those hurt in athletic competition, those injured in the course of medical treatment; those harmed following contact with (variously) prescription drugs, medical devices, contraceptives, lead paint, and firearms.[23] And, certain no-fault regimes—including for vaccines,[24] work-related accidents,[25] motor vehicle accidents,[26] black-lung disease,[27] neurological birth injury,[28] the September 11th terrorist attacks,[29] and nuclear accidents[30]—have been enacted.

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23. *See* Engstrom, *supra* note 22, at 1641 (collecting examples); Kenneth S. Abraham & Robert L. Rabin, *Automated Vehicles and Manufacturer Responsibility for Accidents: A New Legal Regime for a New Era*, 105 VA. L. REV. 127, 147 (2019) (proposing a system of "manufacture enterprise liability" to govern auto accidents once autonomous vehicles comprise a sufficient share of the auto market); Tracy Hresko Pearl, *Compensation at the Crossroads: Autonomous Vehicles & Alternative Victim Compensation Schemes*, 60 WM. & MARY L. REV. 1827, 1833–34 (2019) (proposing the creation of an autonomous vehicle crash victim compensation fund administered by the National Highway Traffic Safety Administration and financed by a tax levied on the sale of all fully autonomous vehicles); *see generally* Eric Lindenfeld, *The Unintended Pregnancy Crisis: A No-Fault Fix*, 17 MARQ. BENEFITS & SOC. WELFARE L. REV. 285 (2016) (proposing a no-fault scheme for those whose contraceptive products fail); Max Meglio, Note, *Embracing Insecurity: Harm Reduction Through a No-Fault Approach to Consumer Data Breach Litigation*, 61 B.C. L. REV. 1223 (2020) (proposing a no-fault scheme to compensate data breach victims).

24. 42 U.S.C. § 300aa–22(b)(1).

25. For a discussion of the widespread enactment of workers' compensation in the early years of the last century, see generally JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2006); PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION (2000).

26. *See, e.g.*, ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965) (proposing the enactment of automobile no-fault compensation); Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's "Demise"*, 61 DEPAUL L. REV. 303, 306 (2012) (explaining that, between 1971 and 1976, some form of automobile no-fault was enacted in more than two-dozen states, and, of those, sixteen states enacted laws that restricted motorists' right to sue—but that, "[a] handful of states (Colorado, Connecticut, Georgia, Nevada, New Jersey, and Pennsylvania) have, in recent years, repealed their mandatory no-fault legislation").

27. Black Lung Benefits Act, 30 U.S.C. §§ 901–945. For additional perspective, see Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699, 703–06 (2005); Allen R. Prunty & Mark E. Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. VA. L. REV. 665, 666–67 (1989).

28. Birth injury funds have only been enacted in Florida and Virginia. For a discussion of these funds, see Rabin, *supra* note 27, at 708–10; Gil Siegal et al., *Adjudicating Severe Birth Injury Claims in Florida and Virginia: The Experience of a Landmark Experiment in Personal Injury Compensation*, 34 AM. J. L. & MED. 489, 490 (2008); David M. Studdert et al., *The Jury Is Still In: Florida's Birth-Related Neurological Injury Compensation Plan after a Decade*, 25 J. HEALTH POL., POL'Y & L. 499, 499 (2000). Some have called for expanded adoption. *E.g.*, Baldemar Gonzalez, *When Tort Falls Short: Crisis, Malpractice Liability, and Women's Healthcare Access*, 119 COLUM. L. REV. 1099, 1120–21 (2019).

29. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42 § 405(b)(2), 115 Stat. 230, 238 (2001) (codified as amended at 49 U.S.C. § 40101). For discussion of the September 11th Victim Compensation Fund, see generally Robert L. Rabin, *The September 11th*

How is it, then, that few have thought that a no-fault regime was the solution to injuries caused by tobacco or opioids—and no such scheme has ever been seriously debated, much less enacted?[31] We chalk this omission up to three realities.

The first is the recognition that we lack the will and capacity to strike a political compromise of this magnitude. For evidence that forging such compromises is hard, one need look no further than asbestos. Starting in the 1980s, asbestos cases filed by individual victims "flooded" the U.S. court system.[32] The court system did not respond to this deluge with particular grace.[33] Indeed, the mess was sufficiently objectionable that the Supreme Court twice implored Congress to step in to help solve the crisis caused by the "elephantine mass of asbestos cases."[34] Congress tried—but repeatedly failed.[35] From 1973

Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?, 53 DEPAUL L. REV. 769 (2003).

30. Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended in disparate sections of 42 U.S.C. § 2210). For more on the Price-Anderson Act, see Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951, 955–58 (1993).

31. To be sure, there have been scattered suggestions to enact a tobacco compensation scheme. *See, e.g.*, DONALD G. GIFFORD, SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION 222–23 (2010) (advocating an administrative compensation scheme for victims of tobacco-related disease, financed by an excise tax on cigarettes); Jon D. Hanson et al., *Smokers' Compensation: Toward a Blueprint for Federal Regulation of Cigarette Manufacturers*, 22 S. ILL. L.J. 519, 521–22 (1998) (proposing a workers' compensation-like scheme in which injured smokers would recover medical expenses directly from tobacco manufacturers, with claims adjudicated by an administrative tribunal); Paul A. LeBel, *Beginning the Endgame: The Search for an Injury Compensation System Alternative to Tort Liability for Tobacco-Related Harms*, 24 N. KY. L. REV. 457, 461 (1997) (sketching desirable features of a no-fault compensation scheme for tobacco). But the proposals never struck a responsive chord in the public policy forum. *See* Sharon Milberger et al., *Tobacco manufacturers' defence against plaintiffs' claims of cancer çausation: throwing mud at the wall and hoping some of it will stick*, 15 TOBACCO CONTROL 17, 25 (2006) (observing, in passing, that "[t]he federal government could create a new national system to compensate injured smokers, as it has done for persons with black lung disease . . . and vaccine-related injuries" while recognizing that "there is no serious consideration of this idea in Washington, DC").

32. Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255, 257–58 (2005).

33. As the Judicial Conference Ad Hoc Committee on Asbestos Litigation put it:

> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 3 (Mar. 1991).

34. For "elephantine mass," see Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999). For calls to action, see *id.* at 821 n.1, 865 (Rehnquist J., concurring); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628–29 (1997). The call was reiterated and amplified in REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 33 (Mar. 12, 1991).

through 2011, Congress convened more than thirty-five hearings and introduced fifty significant bills on asbestos-compensation issues.[36] Despite that flurry of activity, however, Congress ultimately enacted only one bill into law, and that bill only altered the rules of bankruptcy.[37] In the face of such political paralysis—which has, by all accounts, gotten only worse with time—one can quickly understand why the prospects of a no-fault scheme to address other hot-button crises have been viewed as dim.[38]

A second explanatory variable is the stubborn fact that the no-fault systems we *have* adopted in the United States have mixed scorecards, at best.[39] These systems were adopted with high hopes that moving from a tort-based system to a no-fault system would markedly stream-

35. As one commentator aptly observes: "For almost as long as there has been substantial asbestos litigation, there have been federal legislative efforts to address the problems arising therefrom. But so far these efforts have not resulted in a solution." James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. ANN. SURV. AM. L. 223, 241 (2006).

36. *See* JEB BARNES, DUST-UP: ASBESTOS LITIGATION AND THE FAILURE OF COMMONSENSE POLICY REFORM 32 (2011). The bill that had the best chance of passage came in 2004. Titled the Fairness in Asbestos Injury Compensation Act ("FAIR" Act), it would have supplanted the court-based system of asbestos injury compensation with a $140 billion privately-funded, government administered no-fault compensation fund. Christopher J. O'Malley, *Breaking Asbestos Litigation's Chokehold on the American Judiciary*, 2008 U. ILL. L. REV. 1101, 1111 (2008). The fund would have compensated claimants according to published bright-line medical criteria and capped attorneys' fees at five percent. *Id.* at 1117. Despite some bipartisan support, the bill never passed the Senate. Republicans warned that the trust would be inundated with fraudulent or insignificant claims and also that the trust would grow and become a permanent fixture in the federal bureaucracy—as, once it was depleted, the temptation to replenish the fund with taxpayer dollars would be impossible to resist. Democrats argued that the bill was underfunded, favored corporate interests, and closed the courthouse door to injured individuals. Finally, corporations worried that the FAIR Act would allow victims to return to court upon the trust's insolvency. For further discussion, see Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525, 580–93 (2007).

37. In particular, Congress amended the Bankruptcy Code in 1994 to include § 524(g). For more on § 524(g) and its effect, see generally S. Todd Brown, *Section 524(g) Without Compromise: Voting Rights and the Asbestos Bankruptcy Paradox*, 2008 COLUM. BUS. L. REV. 841 (2008).

38. *See generally* Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13 (1988) (explaining that the two principal no-fault movements of the twentieth century—workers' compensation, enacted in nearly every state from 1910 through 1921, and motor vehicle compensation, enacted in more than two dozen states between 1971 and 1976—corresponded to broader ideologically-based sociopolitical movements: Progressive Era reform in the case of workers compensation and Public Interest era reform of the late 1960s in the case of auto no-fault and theorizing that "the fundamental structure of rights to reparation and responsibilities for harm is likely to be altered only when tort reform rides on the coattails of a more powerful ideological impulse").

39. *See* Nora Freeman Engstrom, *Exit, Adversarialism, and the Stubborn Persistence of Tort*, 6 J. TORT L. 75, 78 (2013) (concluding that "all four of our most ambitious no-fault experiments have, in certain respects, failed"). Importantly, this negative assessment only applies to prospective schemes (*i.e.*, those schemes devised to compensate a continuing stream of claimants going forward). Ex post schemes that respond to a singular event (*e.g.*, the September 11th Victim

line procedures, promote predictability, speed payments, limit court congestion, quell combativeness, and reduce the need for attorney involvement. Yet nearly all of the U.S. experiments with no-fault systems have been, at bottom, a disappointment. No-fault mechanisms have become plagued by the problem of exit, as claimants seeking full compensation make end-runs around no-fault, either to evade the regime entirely or to supplement no-fault's comparatively stingy benefits with more generous payments, available only within traditional tort.[40] Or, they have become bogged down by adversarialism, marked by longer times to make decisions and increased combativeness, attorney involvement, and the utilization of formal (rather than informal) adjudicatory procedures.[41] This mixed track record casts a shadow when it comes to undertaking further ambitious reforms.

Finally, both tobacco and opioid claimants pose a particular challenge for no-fault advocates. Particularly in recent decades, policy reformers have generally been able to overcome legislative inertia and deeply ingrained resistance to no-fault schemes only when seeking reforms on behalf of especially sympathetic and undeniably "innocent" victims, such as newborns hurt during the course of birth, vaccine-injured children, and those killed by terrorists on September 11, 2001.[42] Cigarette and opioid victims are seen differently. In fact, in public opinion polls, respondents have consistently blamed smokers, rather than cigarette companies, "for the health problems faced by smokers in this country."[43] And, albeit to a lesser extent, Americans have

compensation Fund) boast a much better track record. *See id.* at 79 n.17 (distinguishing between ex post and prospective schemes); Rabin, *supra* note 27, at 710 (same).

40. *See generally* Engstrom, *supra* note 39. For evidence in the auto sphere, where claimants have gotten increasing adept at "piercing" tort thresholds and making their way into the tort system, see JAMES M. ANDERSON ET AL., THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE: A RETROSPECTIVE xv-xvi (2010); Engstrom, *supra* note 26, at 375–79. For discussion of the extensive resort to third-party tort litigation against product manufacturers by employees injured in the workplace, see Robert L. Rabin, *Accommodating Tort Law: Alternative Remedies for Workplace Injuries*, 69 RUTGERS L. REV. 1119, 1122 (2017). For how exit has afflicted Florida's birth injury fund, see David M. Studdert & Troyen A. Brennan, *Toward a Workable Model of "No-Fault" Compensation for Medical Injury in the United States*, 27 AM. J. L. & MED. 225, 240 (2001); Studdert et al., *supra* note 28, at 523.

41. *See generally* Engstrom, *supra* note 39. For how adversarialism has plagued workers' compensation, see *id.* at 86–88. For how it has eroded Florida's birth injury fund, see *id.* at 110–13. For how adversarialism has plagued the Vaccine Injury Compensation Program, see Engstrom, *supra* note 22, at 1674–77.

42. *See* Rabin, *supra* note 27, at 706, 718–19.

43. *See* THOMAS R. MARSHALL, PUBLIC OPINION, PUBLIC POLICY, AND SMOKING: THE TRANSFORMATION OF AMERICAN ATTITUDES AND CIGARETTE USE, 1890–2016 131–32 (2016) (reporting on polls finding that roughly sixty-five percent of Americans blame smokers "for the health problems faced by smokers in this country," whereas only approximately one-quarter of Americans blame cigarette companies); *Tobacco and Smoking*, GALLUP, https://

blamed opioid users, rather than just pharmaceutical companies or prescribing physicians, for the harm caused by prescription painkillers.[44] A perception that these victims have contributed to their own harm, in our view, has undercut any prospect of no-fault reform just as it seriously undercut plaintiffs' prospects for recovery in tort litigation.

III. Concluding Note

When tragedy strikes, the construction of a no-fault compensation scheme may look alluring. But as we have indicated, the promise of these systems is often illusory. No-fault compensation systems are much discussed but rarely enacted, and the few that have been adopted often work very differently in practice than they do on paper. For the victims of tobacco and opioids-related harm, the likelihood of no-fault compensation is particularly improbable. If anything, this brief exploration may point to the need to expand our vision of which victims "deserve" to receive fair compensation through tort—and our collective obligation to ensure that the civil justice system is as equitable and efficient as possible.

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news.gallup.com/poll/1717/tobacco-smoking.aspx (last visited Oct. 12, 2020) (reporting on Gallup public opinion polls conducted between 1997 and 2008 and finding, fairly consistently, that approximately sixty-five percent of respondents believe that smokers are mostly or completely "to blame for the health problems faced by smokers in this country[,]" whereas only twenty-five percent of Americans pin most or all of the blame on cigarette companies, and the remaining respondents parcel blame out equally).

44. Assessing views about the opioid crisis, one 2019 public opinion survey asked: "How much do you blame each of the following for the problem of opioid addiction?" The survey found that eighty-seven percent of Americans place at least a moderate amount of blame on "individuals who use opioids," compared to eighty-three percent of Americans who place that much blame on pharmaceutical companies, and seventy-six percent who place that much blame on doctors and dentists. Mike Stobbe & Emily Swanson, *AP-NORC Poll: Many blame drug firms for opioid crisis*, Associated Press (Apr. 25, 2019), https://apnews.com/103530ad684f4941999e99467121b5d6. For another opinion poll with somewhat similar results, see Americans' Attitudes About Prescription Painkiller Abuse, Harv. Sch. Pub. Health (Mar. 2016), https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2016/03/STAT-Harvard-Poll-Mar-2016-Prescription-Painkillers.pdf.